TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1926

No. [redacted]225

DIMMITT HOFFMAN, JUDGE OF THE THIRTIETH JUDICIAL CIRCUIT OF MISSOURI, PLAINTIFF IN ERROR,

vs.

STATE OF MISSOURI EX REL. W. E. FORAKER, ADMINISTRATOR OF THE ESTATE OF JAMES STARLING FORAKER, DECEASED

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI

FILED OCTOBER 5, 1925

(31,488)

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SUPREME COURT OF THE UNITED STATES

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No. 765

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STATE OF MISSOURI EX REL. W. E. FORAKER, ADMINISTRATOR OF THE ESTATE OF JAMES STARLING FORAKER, DECEASED

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI

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[fol. 1] **IN SUPREME COURT OF MISSOURI**

In Banc

DIMMITT HOFFMAN, Judge of the Thirtieth Judicial Circuit of Missouri, Plaintiff in Error,

vs.

W. E. FORAKER, Administrator of the Estate of James Starling Foraker, Deceased, Defendant in Error

STIPULATION AND PRÆCIPE FOR TRANSCRIPT OF RECORD

It is stipulated by and between the parties hereto, by their respective attorneys, that the transcript of record in the above entitled cause shall consist of the following:

1. Record entry showing filing of application for writ of error and assignment of error.
2. Application for writ of error and assignment of error.
3. Order granting writ of error and approving bond.
4. Writ of error.
5. Citation in error, together with acknowledgment of service thereon.
6. Record entry showing filing of bond.
7. Bond.
8. Record entry showing filing petition for mandamus in the case of State ex rel. W. E. Foraker, administrator of the estate of James Starling Foraker, deceased, vs. Dimmitt Hoffman, Judge of the Thirtieth Judicial Circuit of Missouri.

[fol. 2] 9. Petition for mandamus in the case of State ex rel. W. E. Foraker, etc., vs. Dimmitt Hoffman, Judge.

10. Record entry showing granting of alternative writ of mandamus in the case of State ex rel. W. E. Foraker, etc., vs. Dimmitt Hoffman, Judge.

11. Alternative writ of mandamus in the case of State ex rel. W. E. Foraker, etc., vs. Dimmitt Hoffman, Judge, together with marshal's return thereon.

12. Record entry showing filing of demurrer in the case of State ex rel. W. E. Foraker, etc., vs. Dimmitt Hoffman, Judge.

13. Demurrer in the case of State ex rel. W. E. Foraker, etc., vs. Dimmitt Hoffman, Judge.

14. Record entry showing filing motion for judgment on pleadings in the case of State ex rel. W. E. Foraker, etc., vs. Dimmitt Hoffman, Judge.

15. Motion for judgment on the pleadings in the case of State ex rel. W. E. Foraker, etc., vs. Dimmitt Hoffman, Judge.

16. Opinion of the Supreme Court of Missouri in the case of State ex rel. W. E. Foraker, etc., vs. Dimmitt Hoffman, Judge.

17. Judgment of the Supreme Court of Missouri in the case of State ex rel. W. E. Foraker, etc., vs. Dimmitt Hoffman, Judge.

18. Record entry showing filing of motion for rehearing in the case of State ex rel. W. E. Foraker, etc., vs. Dimmitt Hoffman, Judge.

19. Motion for rehearing, together with acknowledgment of service thereon, in the case of State ex rel. W. E. Foraker, etc., vs. Dimmitt Hoffman, Judge.

20. Record entry showing overruling of motion for rehearing in the case of State ex rel. W. E. Foraker, etc., vs. Dimmitt Hoffman, Judge.

Roy W. Rucker, Attorney for Plaintiff in Error.
Paul Barnett, Attorney for Defendant in Error.

[fol. 3] IN SUPREME COURT OF MISSOURI

In Banc

[Title omitted]

PETITION FOR WRIT OF ERROR

To Honorable W. W. Graves, Chief Justice of the Supreme Court of the State of Missouri:

Now comes Dimmitt Hoffman, the above named plaintiff in error, by his attorney, Roy W. Rucker, and complains and alleges that, on the 3rd day of July, 1925, the Supreme Court of the State of Missouri, sitting at Jefferson City, Missouri, made and entered a final order and judgment in

the above entitled cause in favor of the defendant in error and against your petitioner, in which final order and decree, and the proceedings had in this cause, certain errors were committed to the prejudice of your petitioner—all of which appeared in detail from the assignment of errors filed in this cause with this petition; and

That the Supreme Court of the State of Missouri is the highest court of said State of Missouri in which a decision in this suit and matter could be had; and

That this suit, or cause, is one which defendant in error instituted in the Supreme Court of Missouri by filing a petition for mandamus, wherein defendant in error prayed the issuance of a writ of mandamus from the Supreme Court of Missouri requiring your petitioner, as Judge of the Thirtieth Judicial Circuit of Missouri, to set aside an order of dismissal in the case of W. E. Foraker, administrator of the estate of James Starling Foraker, deceased, plaintiff, vs. Missouri Pacific Railroad Company, defendant, which said cause had lately been pending before your petitioner as Judge of the Thirtieth Judicial Circuit of Missouri, and requiring your petitioner, as such Judge, to entertain jurisdiction of said case and to proceed in the exercise of such jurisdiction according to law;

That it appeared from the petition filed in the Supreme Court of Missouri, as aforesaid, by defendant in error that your petitioner was, at the time of the filing of the petition for mandamus in the Supreme Court of Missouri, the duly elected, qualified and acting Judge of the Circuit Court of the Thirtieth Judicial Circuit of the State of Missouri, which said circuit was composed of Pettis County, Missouri, and that your petitioner had been Judge of said Thirtieth Judicial Circuit at all the times mentioned in the petition for mandamus; and

[fol. 4] That W. E. Foraker, as administrator of the estate of James Starling Foraker, deceased, had lately filed an action against the Missouri Pacific Railroad Company, a corporation organized in the year 1917 under the laws of the State of Missouri, and owning and operating a railroad running through Pettis and other counties in Missouri, seeking to recover damages against said Missouri Pacific Railroad Company by reason of the death of James Starling Foraker alleged to have been caused by the negligence

of the said Railroad Company, its agents and servants; and

That, at the time of his death and of the injury complained of—November 21, 1923—James Starling Foraker was a resident of Sedgwick County, in the State of Kansas, and employed by the Missouri Pacific Railroad Company as one of a switch engine crew; and at the time of his injury and death the said James Starling Foraker and the Missouri Pacific Railroad Company were engaged in interstate commerce by railroad; and

That the said W. E. Foraker was duly appointed administrator, with the will annexed, of the estate of the said James Starling Foraker, deceased, by the Probate Court of Sedgwick County, Kansas; and

After the filing of the petition by the said W. E. Foraker, as administrator, in the Circuit Court of Pettis County, Missouri, the Missouri Pacific Railroad Company, appearing specially, filed a motion in the Circuit Court of Pettis County to quash the writ of summons issued in the cause, and to dismiss the action, alleging as grounds therefor that Section 1180, Revised Statutes of Missouri of 1919, under which this action was brought and said writ issued, was unconstitutional for the reason that it allowed jurisdiction in actions against carriers of interstate commerce based upon alleged causes of action originating in other states by residents of other states, where such suit might have been lawfully maintained, and thereby imposed a serious and unreasonable burden upon interstate commerce and thus was obnoxious to the commerce clause of the Constitution of the United States as contained in Section 8, of Article I, of said Constitution of the United States; and

That upon a hearing of said motion it was admitted by both parties to said action that, at the time of his death and alleged injury, James Starling Foraker was a citizen and resident of the State of Kansas, and that the cause of action sued upon accrued in the State of Kansas; and

That the defendant Missouri Pacific Railroad Company had at least eleven employees working for it in the State of Kansas—their work being connected with interstate commerce by railroad—who were competent and material witnesses in the cause, and that their attendance at the trial in Pettis County, Missouri, would cause them to be absent

from their work and would involve expense upon the defendant Railroad Company; and

That there were many claims pending against the defendant Railroad Company for personal injuries and for loss and damages for freight, and amounts demanded in such claims were large, and that the defendant Railroad Company often deemed it imperative or advisable to leave the determination of its liability to the courts; and that the plaintiff could lawfully maintain his cause of action, if any, against the defendant Railroad Company in the State of Kansas where the cause of action arose; and

That the Supreme Court of Missouri did, on the 25th day of November, 1924, issue its alternative writ of mandamus, directing your petitioner to make an order setting [fol. 5] aside the order of dismissal in the case of W. E. Foraker, administrator of the estate of James Starling Foraker, deceased, plaintiff, vs. Missouri Pacific Railroad Company, defendant, and to entertain jurisdiction according to law, or show cause before the Supreme Court of Missouri in banc, on or before the 26th day of December, 1924, why such jurisdiction should not be assumed and exercised; and

That thereafter, to-wit, on the 16th day of December, 1924, your petitioner filed in the Supreme Court of Missouri his demurrer alleging, among others, as grounds for said demurrer, that if your petitioner assumed jurisdiction of the cause of W. E. Foraker, administrator of the estate of James Starling Foraker, deceased, vs. Missouri Pacific Railroad Company, your petitioner's action in so doing would be in violation of the commerce clause of the Constitution of the United States as contained in Section 8, of Article I, of said Constitution of the United States; and

That thereafter, and upon a hearing of the cause by the Supreme Court of Missouri, a final judgment was rendered therein, wherein it was adjudged by said Supreme Court that the provisions of Section 1180, Revised Statutes of Missouri, 1919, are not in conflict with or violation of the provisions of Section 8, of Article I, of the Federal Constitution, and by the terms of said final judgment rendered by the Supreme Court of Missouri, your petitioner was directed to assume jurisdiction and proceed with the trial of the cause of W. E. Foraker, administrator of the estate

of James Starling Foraker, deceased, vs. Missouri Pacific Railroad Company, whereby manifest error has happened to the great damage of your petitioner; and

That, in the final judgment in said cause in said Supreme Court, there was drawn in question the validity of a statute of the State of Missouri on the ground of its being repugnant to the Constitution and Laws of the United States, and the decision was in favor of its validity.

Wherefore, your petitioner presents herewith an exemplified transcript of the record of the Supreme Court of Missouri in said cause, and prays that a writ of error to the Supreme Court of the United States be allowed; that citation be granted and signed; that the bond herewith presented be approved, and that said bond and writ of error may operate as a supersedeas that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of said Supreme Court of Missouri be reversed.

Edward J. White, Jas. F. Green, Roy W. Rucker,
Attorneys and of Counsel for Petitioner.

[fol. 6] IN SUPREME COURT OF MISSOURI

In Banc

[Title omitted]

ASSIGNMENTS OF ERROR

Now comes the said Plaintiff in Error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Missouri, in the above entitled matter, there is manifest error in this, to-wit:

The Court erred in holding that the provisions of Section 1180, Revised Statutes of Missouri of 1919, are not in conflict with and in violation of Section 8, of Article I, of the Constitution of the United States, because by and through the provisions of said Section 1180, R. S. Mo. 1919, an undue and unreasonable burden was placed upon interstate commerce in that jurisdiction is allowed in the State

of Missouri upon causes of action against railroads engaged in interstate commerce originating in other states, by persons who were not residents of the State of Missouri, either at the time the cause of action accrued, or at the time of the institution of the suit, who might lawfully maintain a cause of action in the state where the cause of action arose; and by reason of the judgment of the Supreme Court of Missouri in holding that Section 1180, R. S. Mo. 1919, is not in conflict with Section 8, Article I, of the Constitution of the United States, and railroads engaged in interstate commerce passing through Missouri are required, in defending claims for personal injuries, if it is deemed advisable to leave the determination of their liability to the courts, to remove employees engaged in interstate commerce from re-
[fol. 7] mote points, thereby impairing the operating efficiency of such railroads and incurring, directly and indirectly, heavy expense upon such interstate carriers.

Roy W. Rucker, Attorney for Plaintiff in Error.

[fol. 8] IN SUPREME COURT OF MISSOURI

In Banc.

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—August 4, 1925

The above entitled matter coming on to be heard, upon the petition of Dimmitt Hooffman, Judge of the Thirtieth Judicial Circuit of Missouri, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, and upon examination of said petition and the record in said matter, and desiring to give petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said cause;

It is Ordered: That a writ of error be and is hereby allowed to this Court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is, hereby approved, and that this writ of error operate as a supersedeas.

Dated at Jefferson City, Missouri, this 4th day of August, 1925.

W. W. Graves, Chief Justice of the Supreme Court of the State of Missouri.

Attest: —— ——, Clerk of the Supreme Court of the State of Missouri.

[fol. 9] IN SUPREME COURT OF MISSOURI

WRIT OF ERROR

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in said Supreme Court of the State of Missouri, the highest court of law or equity of said State in which a decision could be had in the said suit between State of Missouri ex rel. W. E. Foraker, administrator of the estate of James Starling Foraker, deceased, Relator, and Dimmitt Hoffman, Judge of the Thirtieth Judicial Circuit of Missouri, Respondent, wherein was drawn in question the validity of a statute, or of an authority exercised, under said State, on the ground of their being repugnant to the Constitution and Laws of the United States, and the decision was in favor of their validity; a manifest error has happened to the great damage of the said respondent, as is said and appears by his complaint. We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if judgment be therein given, that then, under your seal distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what

of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this 4th day of August, in the year of our Lord 1925.

F. J. Fromme, Clerk of Dist. Court of the U. S. for the Western District of Missouri, Central Division. (Seal of the United States District Court, Central Division, Western District, of Missouri.)

[fol. 10] Citation, in usual form, showing service on Paul Barnett, omitted in printing.

[fols. 11 & 12] Bond on writ of error for $500.00 approved; omitted in printing.

[fol. 13] [Caption omitted]

[fol. 14] In Supreme Court of Missouri

[Title omitted]

Petition for Mandamus

To the Honorable Judges of the Supreme Court of the State of Missouri:

The relator, W. E. Foraker, is administrator of the estate of James Starling Foraker, deceased. The Missouri Pacific Railroad Company is a railroad corporation organized in the year 1917 under the laws of the State of Missouri, and owning and operating a railroad running into and through Pettis County and Johnson County, and other counties in the State of Missouri, and at all times herein mentioned said Company maintained a place of business in Pettis County, Missouri, with a station agent in charge thereof.

The defendant, Dimmitt Hoffman, is and, at all times herein mentioned, was the duly elected, qualified and acting Judge of the Circuit Court of the Thirtieth Judicial Cir-

cuit of the State of Missouri, which judicial circuit is composed of Pettis County, Missouri.

On the 4th day of September, 1924, this relator, W. E. Foraker, as administrator of the estate of James Starling Foraker, deceased, instituted a suit and filed a petition in the Circuit Court of Pettis County, Missouri, in which W. E. Foraker, administrator of the estate of James Starling Foraker, deceased, was plaintiff, and Missouri Pacific Railroad Company was defendant. When this petition was filed, the Clerk of the Circuit Court of Pettis County, Missouri, issued a summons commanding the Sheriff of Pettis County, Missouri, to summon Missouri Pacific Railroad Company that it be and appear in said Circuit Court in the City of Sedalia, in Pettis County, Missouri, on the first Monday in November, 1924, to answer the petition of said plaintiff; and the Sheriff served said summons upon said Railroad Company by delivering a copy of said writ, together with a certified copy of said petition to C. H. Goforth, the freight agent in charge of the freight house and place of business of said defendant in Pettis County, Missouri, together with said certified copy of said petition; and he made return upon said summons that he had so served the same and that the President and other chief officers of said defendant were absent and that he served the same upon said C. H. Goforth, who was then in charge of said place of business, and that it was served at said place of business of said defendant.

Said petition which was filed as aforesaid, omitting caption and signatures, was as follows:

[fol. 15] PETITION FILED IN CIRCUIT COURT OF PETTIS COUNTY

On November 21, 1923, James Starling Foraker died testate, at Wichita, Kansas, and left surviving him his father, J. B. Foraker, age seventy-nine years, and his mother, Emaline Foraker, age seventy-four years, both of whom were dependent upon him for support, and both of whom he had been supporting up to the time of his death, and at the time of his death he was a single man without any

children or other dependents than his said father and mother.

The said James Starling Foraker, at the time of his death, was a resident of Sedgwick County, in the State of Kansas, and on the 7th day of January, 1924, this plaintiff was appointed administrator, with the will annexed, of the said James Starling Foraker, deceased, by the Probate Court of Sedgwick County, Kansas, and, by reason of such appointment, this plaintiff became the trustee for the benefit of the said J. B. Foraker and Emaline Foraker of the cause of action herein stated.

The defendant is a corporation duly incorporated under and by virtue of the laws of the State of Missouri, and it owns and operates a railroad running through the States of Missouri and Kansas and running through Pettis County, Missouri, and in and through the City of Wichita, Kansas. And at the time of the death of the said James Starling Foraker he was an employee of defendant, and at the time of such death both he and the defendant were engaged in interstate commerce by railroad.

On November 21, 1923, James Starling Foraker was employed by the defendant as a switchman in defendant's switching yards at Wichita, in the State of Kansas, and on said day, while so employed, the switch engine used by the crew of which said James Starling Foraker was a member went in on a track of the defendant, commonly known as the auto dock track, and coupled on to three cars and then backed off for the purpose of pulling said cars off of said track, all of which work was being done by defendant through its agents, servants and employees. The said James Starling Foraker, in the course of his employment, was riding on one of said cars, and his body was caught between one of said cars and an unloading dock belonging to and under the control of the defendant, known as the auto dock, in such manner that he was crushed and thrown and received injuries therefrom from which he died. The Death of the said James Starling Foraker was the direct result of the negligence of the defendant, its agents, servants and employees.

At the time of his death James Starling Foraker was an able-bodied man regularly making large wages, and his said father and mother were regularly receiving large sums

from him for support, and would have continued to receive the same had he not died, and they were his next of kin.

By reason of the above stated facts, the said J. B. Foraker and Emaline Foraker have been damaged in the sum of $30,000, for which sum, together with the costs of this suit, this plaintiff prays judgment against the defendant.

Thereafter, on the 1st day of the November, 1924, term of said court, the defendant filed a motion in said cause and in said court, which motion, omitting caption and signatures, is as follows:

MOTION TO DISMISS

Comes now the defendant and, appearing for the purposes of this motion only, moves the court to quash the writ of summons heretofore issued in this cause and to [fol. 16] dismiss this action for the reason that Section 1180, Revised Statutes of Missouri of 1919, under which this action was brought and said writ issued, is unconstitutional for the reason that it allows jurisdiction in actions against carriers of interstate commerce which are based upon causes of action originating in other states where such suit might be lawfully maintained, and thereby imposes upon interstate commerce a serious and unreasonable burden obnoxious to the commerce clause of the Constitution of the United States, as contained in Section 8, of Article I, of said Constitution of the United States, and which gives to Congress the power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

The defendant further states that it is an interstate carrier, engaged in interstate commerce in and between the States of Kansas and Missouri and many other states, and that the cause of action sued upon in this cause accrued to the plaintiff in the State of Kansas; that this defendant has a great many employees working for it in the State of Kansas, and that there are many claims against this defendant for personal injuries and for loss and damage to freight, and that the amounts demanded in such claims are large, and that the defendant oftentimes deems

it imperative or advisable to leave the determination of its liability to the courts; but that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of the defendant's employees from their customary occupations and thereby impairs the efficiency in operation of the defendant's business as an interstate carrier and causes, directly and indirectly, heavy expense to this carrier.

The defendant further states that said Section 1180 permits a railroad company, although engaged in interstate commerce, to be sued in any county in the State of Missouri where such corporation shall have or usually keeps an officer or agent for the transaction of its usual and customary business, wholly without regard to whether the cause of action of the plaintiff arose within or without the State of Missouri, or within a foreign state in which action might lawfully be brought without thereby imposing an undue and unreasonable burden upon interstate commerce.

The defendant further states that the plaintiff was, at the time the cause of action sued upon arose, a resident of the State of Kansas, and that his administrator may lawfully maintain his action, if any, against this defendant in the State of Kansas, where the cause of action arose, without imposing any undue or unreasonable burden upon interstate commerce.

Thereafter, on the — day of November, 1924, said motion was taken up by the court for consideration and determination, and to sustain the allegations of the motion to dismiss, the defendant offered in evidence an admission of the plaintiff and defendant, which admission was in writing and signed by the parties to this cause and was filed in said court. Said admission, omitting caption and signatures, is as follows:

It is admitted by the parties to this cause that the Missouri Pacific Railroad Company is a railroad corporation organized in 1917 under the laws of the State of Missouri, and owning and operating a line of railroad running through Pettis County and other counties of the State of Missouri, and into and through the States of Kansas, Arkansas and other states of the United States; that it is a common carrier by railroad and is engaged in interstate commerce in the carriage of both freight and passengers;

that the plaintiff is a citizen and resident of the State of Kansas, and that James Starlin Foraker, deceased, was, at the time of his death, a citizen and resident of the State of Kansas, and that the cause of action sued upon in this cause accrued in the State of Kansas; that defendant has at least eleven employees working for it in the State of [fol. 17] Kansas *of Kansas* who are competent and material witnesses in this cause; that there are many claims against the defendant for personal injuries and for loss and damages for freight, and that the amounts demanded in such claims are often large, and that the defendant oftentimes deems it imperative or advisable to leave the determination of its liability to the courts; that defendant cannot safely proceed to trial in this cause without the testimony of some of its employees in the State of Kansas, and that to procure their attendance at the trial in Pettis County, Missouri, would cause absence from their work; and that their work is connected with interstate commerce by railroad on the part of the defendant, and that to procure their attendance would involve expense upon the part of defendant. It is further admitted that the plaintiff may lawfully maintain his cause of action, if any, against the defendant in the State of Kansas where the cause of action arose.

The above admission was the only evidence offered in support of the defendant's motion to dismiss. Whereupon, the court sustained said defendant's motion to dismiss, and held that the Circuit Court of Pettis County, Missouri, had no jurisdiction to try said cause of action, and held that Section 1180 of the Revised Statutes of Missouri of 1919 was, as to this defendant and this suit, unconstitutional under Section 8, of Article I, of the Constitution of the United States, which gives to Congress the power to regulate interstate commerce, because to permit said suit to be maintained would be an undue burden upon interstate commerce. To which action of the court the plaintiff then and there duly excepted and saved his exceptions at the time.

Relator states that said cause of action was brought under Section 1180 of the Revised Statutes of Missouri of 1919, and under Section 1163 of the Revised Statutes of Missouri of 1919, and Section 1156 of the Revised Statutes of Missouri of 1919, and under the Federal Employers Liability Act, and the plaintiff did not bring said suit for

his own benefit, but for the benefit of the father and mother of James Starling Foraker, deceased, who were dependent upon him for support, and he did not bring said suit as administrator in the administration of the estate of James Starling Foraker, but as ex-officio trustee for the father and the mother of James Starling Foraker, deceased.

After Missouri Pacific Railroad Company had filed its motion to dismiss, said petition and suit, and before said motion was passed upon, defendant filed written objections to the sustaining of such motion, raising a constitutional question as quickly as it could be raised, which written objections, omitting caption and signatures, were as follows:

OPPOSITION TO MOTION TO DISMISS

Comes now the plaintiff in the above entitled cause and objects to the court's sustaining defendant's motion to dismiss for the following reasons:

1. Because Missouri Pacific Railroad Company is a corporation organized under the laws of the State of Missouri, and Section 1180 of the Revised Statutes of Missouri of 1919 is a part of its charter, and the provisions thereof are a burden upon defendant which it voluntarily assumed.

2. Because under the provisions of the Employers' Liability Act this suit is expressly authorized to be brought in this court.

[fol. 18] 3. Because the institution of this suit is not such a burden upon interstate commerce as is unreasonable or unconstitutional.

4. Because defendant is actually present in the State of Missouri and in Pettis County.

5. Because, for this court to deny plaintiff the right to sue in this court would deny to him privileges and immunities of citizens of the several states and of the State of Missouri and of the United States, and would abridge the privileges and immunities as a citizen of the United States contrary to Section 2, Article 4, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Relator states that the respondent, the Honorable Dimmit Hoffman, Judge of the Thirtieth Judicial District of Missouri, did not erroneously exercise his jurisdiction, and did not err in the exercise of his jurisdiction, and did not hold that the Circuit Court of Pettis County, Missouri, had no jurisdiction upon a hearing of the cause, but said Judge simply erroneously held that he had no jurisdiction over said cause and refused, upon a preliminary motion, to exercise any jurisdiction whatsoever over said cause or the parties thereto; and this relator has no adequate remedy at law or in equity, because the court has refused to hear said cause and an appeal could not present the issues in said case to the consideration of this court, but only the preliminary matter as to whether or not said cause should be considered at all; and there is a doubt in the present state of the law of the State of Missouri as to whether such question could be determined upon appeal, and if it could be determined upon appeal, said appeal would be an inadequate remedy because it would take a second appeal to determine the merits of the cause.

Relator states that said cause was properly brought in the Circuit Court of Pettis County, Missouri, and said defendant Railroad Company was properly served with process, and the Circuit Court of Pettis County, Missouri, had jurisdiction over the subject matter of said cause of action and over the parties thereto; and the respondent, the Honorable Dimmitt Hoffman, as said Judge of said court, has refused and still refuses to exercise his jurisdiction or to entertain jurisdiction of said cause or the parties thereto.

Wherefore, the relator prays the court for a writ of mandamus requiring the respondent, the Honorable Dimmitt Hoffman, as Judge of the Circuit Court of the Thirtieth Judicial Circuit of Missouri, to set aside his order dismissing the case of W. E. Foraker, administrator of the estate of James Starling Foraker, deceased, plaintiff, vs. Missouri Pacific Railroad Company, defendant, and requiring him as such judge to entertain jurisdiction of said case, and requiring him to further proceed in such case in the exercise of such jurisdiction according to law.

Paul Barnett, Attorney for Realtor.

Duly sworn to by Paul Barnett. Jurat omitted in printing.

[fol. 19] IN SUPREME COURT OF MISSOURI

En Banc

[Title omitted]

ORDER FOR ALTERNATIVE WRIT OF MANDAMUS—November 25, 1924

Now, at this day, the Court having considered and fully understood the petition heretofore filed by the said relator for a writ of mandamus herein, it is ordered by the Court that an alternative writ of mandamus issue herein, directed to the said respondent, the said alternative writ to be returnable on or before the 26th day of December, 1924, in Court en Banc.

[fols. 20 & 21] IN SUPREME COURT OF MISSOURI

[Title omitted]

ALTERNATIVE WRIT OF MANDAMUS—November 25, 1924

The State of Missouri to Dimmitt Hoffman, Judge of the Circuit Court of the Thirtieth Judicial Circuit of Missouri, Greeting:

Whereas, it has been represented to this Court, on the part of W. E. Foraker, administrator of the estate of James Starling Foraker, deceased, relator, as indicated and set forth in a certain petition for a writ of mandamus, a copy of which petition is hereto attached:

Now, therefore, we being willing that due and speedy justice be done to the said W. E. Foraker, administrator, in this behalf, command you, the said Dimmit Hoffman, Judge of the Thirtieth Judicial Circuit of Missouri, that you do, without further delay or excuse, immediately after the receipt of this writ, make an order setting aside the order heretofore made by you dismissing the case of W. E. Foraker, administrator of the estate of James Starling Foraker, deceased, plaintiff, vs. Missouri Pacific Railroad Company, defendant, and that you do entertain jurisdiction of said cause, as such judge, and proceed therein in the exer-

cise of your jurisdiction according to law, or that you show cause, if any you have, before the Supreme Court of Missouri in Banc, on or before the 26th day of December, 1924, why you should not do so.

Herein fail not at your peril.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of Missouri, at my office in the City of Jefferson, this 25th day of November, 1924.

J. D. Allen, Clerk, by A. L. Pryor, D. C. (Seal.)

[fols. 22 & 22a] In Supreme Court of Missouri

[Title omitted]

Demurrer—Filed December 16, 1924

Comes now the respondent in the above entitled cause and, for answer and return, demurs to the petition and writ of the relator for the following reasons:

I

Because said petition, and the matters and things as stated and set forth therein, is not sufficient in law nor in equity to entitle the relator to the relief asked for in said petition, or to authorize the issuing of a peremptory writ of mandamus.

II

Because said petition does not show that relator has exhausted or availed himself of all legal remedy (other than mandamus) to secure the vacation of the orders complained of in his petition, or that he is otherwise without any adequate legal remedy.

III

Because if respondent had assumed jurisdiction of the cause of W. E. Foraker, administrator of the estate of James Starling Foraker, deceased, vs. Missouri Pacific Railroad Company, respondent's action in so doing would have been in violation of the commerce clause of the Con-

stitution of the United States as contained in Section 8, of Article 1, of said Constitution of the United States.

Montgomery & Rucker, Attorneys for Respondent.

[fol. 23] IN SUPREME COURT OF MISSOURI

In Banc

[Title omitted]

RELATOR'S MOTION FOR JUDGMENT—Filed December 18, 1924

Comes now the relator in the above entitled cause and moves the court to render judgment for the relator and against the respondent upon the pleadings in this cause, and to issue its peremptory writ of mandamus thereon against the respondent as prayed for in the petition, for the following reasons:

First. Because the petition states a cause of action.

Second. Because the respondent has filed a demurrer to the petition and no other pleading, and has thereby confessed the truth of all of the allegations of the petition.

Third. Because the pleading filed by the respondent does not allege any cause why the peremptory writ of mandamus should not go.

Paul Barnett, Attorney for Relator.

Received a copy of the above motion this 16th day of December, 1924, together with notice that said motion would be filed in the Supreme Court of Missouri on the 17th day of December, 1924.

Montgomery & Rucker, Attorneys for Respondent.

[fol. 24] IN SUPREME COURT OF MISSOURI

En Banc

[Title omitted]

ARGUMENT AND SUBMISSION—January 26, 1925

Come now the said parties, by their respective attorneys, and after argument herein, submit this cause to the Court.

IN SUPREME COURT OF MISSOURI

En Banc

[Title omitted]

JUDGMENT—July 3, 1925

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the alternative writ of mandamus heretofore issued herein be, and the same is hereby, made peremptory. (Opinion filed.)

[fol. 25] IN SUPREME COURT OF MISSOURI

En Banc

[Title omitted]

OPINION

This is an original proceeding by mandamus brought in this court by the relator against the respondent, as Judge of the Circuit Court of Pettis County, to compel him to proceed with the trial of the case of W. E. Foraker, administrator of the estate of James Starling Foraker, deceased, against the Missouri Pacific Railway Company, pending in the Circuit Court of Pettis County, Missouri.

The facts out of which this case grew will best appear by a substantial statement of the petition filed by the relator asking for the writ of mandamus, and the respondent's return thereto.

On November 21, 1923, James Starling Foraker died testate, at Wichita, Kansas, and left surviving him his father, J. B. Foraker, age seventy-nine years, and his mother, Emaline Foraker, age seventy-four years, both of whom were dependent upon him for support, and both of whom he had been supporting up to the time of his death, and at the time of his death he was a single man without any children or other dependents than his said father and mother.

The said James Starling Foraker at the time of his death, was a resident of Sedgwick County, in the State of Kansas, [fol. 26] and on the 7th day of January, 1924, this plaintiff was appointed administrator with the will annexed of the said James Starling Foraker, deceased, by the probate court of Sedgwick County, Kansas, and by reason of such appointment, this plaintiff became the trustee for the benefit of the said J. B. Foraker and Emaline Foraker of the cause of action herein stated.

The defendant is a corporation duly incorporated under and by virtue of the laws of the State of Missouri, and it owns and operates a railroad running through the States of Missouri and Kansas and running through Pettis County, Missouri, and in and through the City of Wichita, Kansas. And at the time of the death of the said James Starling Foraker he was an employe of defendant and at the time of such death, both he and the defendant were engaged in interstate commerce by railroad.

On November 21, 1923, James Starling Foraker was employed by the defendant as a switchman in defendant's switching *years* at Wichita, in the State of Kansas, and on said day while so employed, the switch engine being used by the crew of which James Starling Foraker was a member, went in on a track of the defendant, commonly known as the auto dock track, and coupled on to three cars and then backed off for the purpose of pulling said cars off of said track, all of which work was being done by defendant through its agents, servants and employes. The said James Starling Foraker, in the course of his employment, was riding on one of said cars and his body was caught between one of said cars and an unloading dock belonging to and under the control of the defendant, known as the auto dock, in such manner that he was crushed and thrown and received injuries therefrom, from which he died. The death of the said James Starling Foraker was the direct result of the negligence of the defendant, its agents, servants and employes.

At the time of his death, James Starling Foraker was an able bodied man regularly making large wages and his said [fol. 27] father and mother were regularly receiving large sums from him for support, and would have continued to receive the same had he not died, and they were his next of kin.

By reason of the above stated facts, the said J. B. Foraker and Emaline Foraker have been damaged in the sum of $30,000.00 for which sum, together with the costs of this suit this plaintiff prays judgment against the defendant.

Thereafter, on the 1st day of the November, 1924, term of said court, the defendant filed a motion in said cause and in said court, which motion, omitting caption and signatures, is as follows: Comes now the defendant and appearing only for the purpose of this motion, moves the court to quash the writ of summons heretofore issued in this cause and to dismiss this action for the reason that Section 1180 Revised Statutes of Missouri of 1919, under which this action was brought and said writ issued, is unconstitutional for the reason that it allows jurisdiction in actions against carriers of interstate commerce which are based upon causes of action originating in other states where such suit might be lawfully maintained and thereby imposes upon interstate commerce a serious and unreasonable burden obnoxious to the commerce clause of the Constitution of the United States as contained in Section 8 of Article I of said Constitution of the United States and which gives to Congress the power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

The defendant further states that it is an interstate carrier engaged in interstate commerce in and between the States of Kansas and Missouri and many other states and that the cause of action sued upon in this cause accrued to the plaintiff in the State of Kansas, that this defendant has a great many employes working for it in the State of Kansas and that there are many claims against this defendant for personal injuries and for loss and damage to freight and that the amounts demanded in such claims are large and [fol. 28] that the defendant oftentimes deems it imperative or advisable to leave the determination of its liability to the courts, but that litigation in states and jurisdictions remote from that in which the cause of action arose, entails absence of the defendant's employes from their customary occupations and thereby impairs the efficiency in operation of the defendant's business as an interstate carrier and causes directly and indirectly heavy expenses to this carrier.

The defendant further states that said Section 1180 permits a railroad company, although engaged in interstate

commerce, to be sued in any county in the State of Missouri where such corporation shall have or usually keep an officer or agent for the transaction of its usual and customary business, wholly without regard to whether the cause of action of the plaintiff arose within or without the State of Missouri, or within a foreign state in which action might lawfully be brought without thereby imposing an undue and unreasonable burden upon interstate commerce.

The defendant further states that the plaintiff was at the time the cause of action sued upon arose, a resident of the State of Kansas and that this administrator may lawfully maintain his action, if any, against this defendant in the State of Kansas, where the cause of action arose, without imposing any undue or unreasonable burden upon interstate commerce.

Thereafter, on the 12th day of November, 1924, said motion was taken up by the court for consideration and determination and to sustain the allegations of the motion to dismiss, the defendant offered in evidence an admission of the plaintiff and defendant, which admission was in writing and signed by the parties to this cause and was filed in said court. Said admission, omitting caption and signature, is as follows:

It is admitted by the parties to this cause that the Mis- [fol. 29] souri Pacific Railroad Company is a railroad corporation organized in 1917 under the laws of the State of Missouri and owning and operating a line of railroad running through Pettis County and other counties of the State of Missouri, and into and through the States of Kansas, Arkansas, and other states of the United States; that it is a common carrier by railroad and is engaged in interstate commerce in the carriage of both freight and passengers; that the plaintiff is a citizen and resident of the State of Kansas and that James Starling Foraker, deceased, was, at the time of his death, a citizen and resident of the State of Kansas, and that the cause of action sued upon in this cause accrued in the State of Kansas; that defendant has at least eleven employes working for it in the State of Kansas who are competent and material witnesses in this cause; that there are many claims against the defendant for personal injuries and for loss and damages for freight and that the amounts demanded in such claims are often large, and that the defendant often deems it imperative or

advisable to leave the determination of its liability to the courts; that defendant can not safely proceed to trial in this cause without the testimony of some of its employes in the State of Kansas and that to procure their attendance at the trial in Pettis County, Missouri, would cause absence from their work; that their work is connected with interstate commerce by railroad on the part of the defendant, and that to procure their attendance would involve expense upon the part of defendant. It is further admitted that the plaintiff may lawfully maintain his cause of action, if any, against the defendant in the State of Kansas where the cause of action arose.

The above admission was the only evidence offered in support of the defendant's motion to dismiss. Whereupon, the court sustained said defendant's motion to dismiss and held that the Circuit Court of Pettis County, Missouri, had [fol. 30] no jurisdiction to try said cause of action, and held that Section 1180 of the Revised Statutes of Missouri of 1919 was, as to this defendant and this suit, unconstitutional under Section 8, of Article I, of the Constitution of the United States which gives to congress the power to regulate interstate commerce because to permit said suit to be maintained would be an undue burden upon interstate commerce. To which action of the court the plaintiff then and there duly excepted and saved his exceptions at the time.

Relator states that said cause of action was brought under Section 1180 of the Revised Statutes of Missouri of 1919, and under Section 1163 of the Revised Statutes of Missouri of 1919, and Section 1156 of the Revised Statutes of Missouri of 1919, and under the Federal Employers' Liability Act, and the plaintiff did not bring said suit for his own benefit, but for the benefit of the father and mother of James Starling Foraker, deceased, who were dependent upon him for support, and he did not bring said suit as administrator in the administration of the estate of James Starling Foraker, but as ex-officio trustee for the father and the mother of James Starling Foraker, deceased.

After Missouri Pacific Railroad Company had filed its motion to dismiss said petition and suit, and before said motion was passed upon, defendant filed written objections to the sustaining of such motion, raised a constitutional question as quickly as it could be raised, which written

objections, omitting caption and signatures, were as follows:

Comes now the plaintiff in the above entitled cause and objects to the court's sustaining defendant's motion to dismiss for the following reasons:

1. Because Missouri Pacific Railroad Company is a corporation organized under the laws of the State of Missouri, and Section 1180 of the Revised Statutes of Missouri of 1919, is a part of its charter and the provisions [fol. 31] thereof are a burden upon defendant which it voluntarily assumed.

2. Because under the provisions of the Employers' Liability Act this suit is expressly authorized to be brought in this court.

3. Because the institution of this suit is no such a burden upon interstate commerce as is unreasonable or unconstitutional.

4. Because defendant is actually present in the State of Missouri and in Pettis County.

5. Because, for this court to deny plaintiff the right to sue in this court would deny to him privileges and immunities of citizens of the several states and of the State of Missouri and of the United States, and would abridge the privileges and immunities as a citizen of the United States contrary to Section 2, Article 4, and Section 1, of the Fourteenth Amendment of the Constitution of the United States.

Relator states that the respondent, the Honorable Dimmitt Hoffman, Judge of the Thirtieth Judicial District of Missouri, did not erroneously exercise his jurisdiction and did not err in the exercise of his jurisdiction, and did not hold that the Circuit Court of Pettis County, Missouri, had not jurisdiction upon a hearing of the cause, but said Judge simply erroneously held that he had no jurisdiction over said cause and refused, upon a preliminary motion, to exercise any jurisdiction whatsoever over said cause or the parties thereto; and this relator has no adequate remedy at law or in equity, because the court has refused to hear said cause and an appeal could not present the issues in said cause to the consideration of this court, but only the

preliminary matter as to whether or not said cause should be considered at all; and there is a doubt in the present state of the law of the State of Missouri as to whether such question could be determined upon appeal, and if it could be determined upon appeal, said appeal would be an in- [fol. 32] adequate remedy because it would take a second appeal to determine the merits of the cause.

Relator states that said cause was properly brought in the Circuit Court of Pettis County, Missouri, and said defendant railroad company was properly served with process and the Circuit Court of Pettis County, Missouri, had jurisdiction over the subject matter of said cause of action and over the parties thereto, and the respondent, the Honorable Dimmitt Hoffman, as said judge of said court, has refused and still refuses to exercise his jurisdiction or to entertain jurisdiction of said cause or the parties thereto.

Wherefore, the relator prays the court for a writ of mandamus requiring the respondent, the Honorable Dimmitt Hoffman, as Judge of the Circuit Court of the Thirtieth Judicial Circuit of Missouri, to set aside his order dismissing the case of W. E. Foraker, administrator of the estate of James Starling Foraker, deceased, plaintiff, v. Missouri Pacific Railroad Company, defendant, and requiring him as such judge to entertain jurisdiction of said case, and requiring him to further proceed in such case in the exercise of such jurisdiction according to law.

As previously stated on the 25th day of November, 1924, this court issued its alternative writ of mandamus in this case.

On the 16th day of December, 1924, the respondent filed in this court its demurrer, which demurrer, omitting caption and signatures, is as follows:

Comes now the respondent in the above entitled cause and for answer and return demurs to the petition and writ of the relator for the following reasons:

1. Because said petition, and the matters and things as stated and set forth therein, is not sufficient in law nor in equity to entitle the relator to the relief asked for in said petition or to authorize the issuing of a peremptory writ of mandamus.

[fol. 33] 2. Because said petition does not show that relator has exhausted or availed himself of all legal remedy (other than mandamus) to secure the vacation of the orders complained of in his petition or that he is otherwise without any adequate remedy.

3. Because if respondent had assumed jurisdiction of the cause of W. E. Foraker, administrator of the estate of James Starling Foraker, deceased, v. Missouri Pacific Railroad Company, respondent's action in so doing would have been in violation of the commerce clause of the Constitution of the United States.

Thereafter the relator filed in this court a motion for judgment on the pleadings.

Opinion

I

Counsel for relator first insists that under Section 1180 R. S. 1919 that: "Suits against corporations shall be commenced either in the county where the cause of action accrued, or in case the corporation defendant is a railroad company owning, controlling or operating a railroad running into or through two or more counties in this state, then in either of such counties, or in any county where such corporation shall have or usually keep an office or agent for the transaction of its usual and customary business."

Counsel for respondent do not contend that this Section of the statute does not authorize the bringing of this suit in the Circuit Court of Pettis County, but insists that said Section is void and of no force or effect in cases involving interstate commerce—in that it imposes undue or unreasonable burdens upon interstate commerce and is therefore in violation of the commerce clause of the Constitution. Citing the following cases in support thereof:

[fol. 34] "Textbook Co. v. Pig, 217 U. S. 91;
Western Union v. Kansas, 216 U. S. 1;
Norfolk & Western v. Pa., 136 U. S. 114;
McCall v. California, 136 U. S. 104;
Piccard v. Car Co., 117 U. S. 34;
Ashier v. Texas, 128 U. S. 129;
Davis v. Farmers Equity Co., 262 U. S. 312."

We have investigated all these cases, and without stopping to analize them here, we are of the opinion that none of them sustain the position contended for by counsel for respondent.

The case of Davis v. Farmers Co-operative Equity Co., 262 U. S. 312, seems to come nearer to holding what counsel for respondent contends for, yet the facts in that case were so radically different from those of this case, it cannot be held to sustain the insistence made in this case. In that case the Supreme Court held—"that to permit a suit against the director general of railroads, operating a foreign railroad corporation, not operating or owning any line of railroad in the state, to be brought by a non-resident of the state on a cause of action which did not arise in the state, where the only agent of the railroad company upon whom service was had was a mere soliciting agent to solicit foreign traffic to be forwarded over its railroad lines outside of the state, was an undue burden upon interstate commerce and should not be permitted, and that the Supreme Court of the United States had jurisdiction to determine the matter under the commerce clause of the Federal constitution."

The facts of this case are that the respondent was the owner and operator of a railroad in this state, and had an agent upon whom service was had, and who transacted the ordinary and usual business of the company in Pettis County, through which the railroad ran.

But independent of that case, the same court has held that the fact that a corporation is engaged in interstate commerce does not exempt it from suits in the state courts, under the same circumstances and at the same place, as [fol. 35] though it were not engaged in interstate commerce. (International Harvester Co. v. Ky., 234 U. S. 579.)

The fact that the defendant is engaged in interstate commerce is only material in determining whether or not the Federal Courts have jurisdiction in those classes of cases, as provided for by the commerce clauses of the constitution. In such cases it is not important to determine where they may be brought. The Supreme Court of the United States has always held that the presence in the state of a mere soliciting agent and nothing more, does not made a

foreign corporation present in the state, so as to subject it to a suit and process of the local or state courts.

"Maverick Mills v. Davis, 294 Fed. 404, l. c. 406;
O'Brien v. Tel. Co., 292 Fed. 379;
Knapp v. Tractor Co., 242 Fed. 543;
Bank v. Fed. Reserve Bank, 286 Fed. 566;
Ins. Co. v. Nicholis, 24 S. W. 910;
Denver etc. Co. v. Roller, 100 Fed. 738;
State v. Graham, 239 Mo. 135;
15 C. J. 791; 14a C. J. 1383;
Peoples Tobacco Co. v. Amer. Tobacco Co., 246 U. S. 79;
Stephen v. Union Pac., 275 Fed. 709."

This court has sustained an action against an interstate carrier under the statutes of Missouri, where the bringing of the action constituted a much heavier burden upon interstate commerce than would be imposed by the prosecution of the instant case. Thus, it has been held by this court that a foreign corporation might bring a suit in Missouri upon a transitory cause of action against a foreign railroad corporation engaged in interstate commerce, even though the cause of action accrued outside of the state and the defendant railroad had no line and no agent in the state. The process was served by summoning as garnishee, another railroad company which had an agent in the state and which owed a balance to the defendant corporation. (State ex rel. Ry. v. Taylor, 298 Mo. 474.) Affirmed by Supreme Court of the United States, Nov. 17, 1924.

[fol. 36 & 37] II

There is no merit in the contention that mandamus was not the proper remedy in this case.

"State v. Dickey, 219 S. W. l. c. 367;
State ex rel. v. Homer, 249 Mo. 58;
State ex rel. v. Shackelford, 263 Mo. l. c. 60;
State ex rel. v. Phillips, 97 Mo. 331;
State v. Seehorn, 223 S. W. l. c. 667;
Castello v. St. Louis Circuit Court, 28 Mo. l. c. 274;
Morton v. Telegraph Co., 217 S. W. l. c. 834;
State ex rel. v. O'Bryan, 102 Mo. l. c. 259;
State ex rel. v. Court, 73 Mo. 560."

III

For the reasons stated the peremptory writ of mandamus is ordered to issue.

All concur. A. M. Woodson, Judge.

[fol. 38 & 39] Petition for rehearing, covering 2 pages, filed July 13, 1925, omitted from this print. It was denied and nothing more by order July 18, 1925.

[fols. 40-42] In Supreme Court of Missouri

En Banc

[Title omitted]

Order Overruling Petition for Rehearing—July 18, 1925

Now, at this day, the Court having considered the motion heretofore filed by the said respondent for a rehearing herein, doth order that the said motion be, and the same is hereby, overruled.

In Supreme Court of Missouri

Clerk's Certificate

I, J. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the cause entitled "The State of Missouri, at the Relation of W. E. Foraker, Administrator of the estate of James Starling ——, deceased, Relator, vs. Dimmitt Hoffman, Judge of the Thirtieth Judicial Circuit of Missouri, Respondent," No. 26042, with all things concerning the same, so far as called for and designated by the stipulation for transcript of the record herein, as fully as the same appear of record and on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Jefferson, State aforesaid, this 31st day of August, 1925.

J. D. Allen, Clerk, by A. L. Pryor, Deputy Clerk.

(Seal of the Supreme Court of Missouri.)

[fols. 43 & 44] Stipulation and præcipe for transcript of record omitted; printed side page 1 ante.

[fols. 45 & 46] Assignments of error omitted; printed side page 6 ante.

[fol. 47] In Supreme Court of the United States

Statement of Points to be Relied Upon and Stipulation as to Parts of Record to be Printed—Filed October 16, 1925.

Comes now Plaintiff in Error and submits the following Points to be relied upon by Plaintiff in Error in the above captioned case:

I

A state has no power to pass a law which imposes an undue or unreasonable burden upon interstate commerce, and such a law when passed is void.

International Textbook Co. vs. Pig, 217 U. S. 91;
Western Union Telegraph Co. vs. Kansas, 216 U. S. 1;
Norfolk & Western Railroad Co. vs. Pa., 136 U. S. 114;
McCall vs. California, 136 U. S. 104;
Piccard vs. Pullman Southern Car Co., 117 U. S. 34;
Ashier vs. Texas, 128 U. S. 129;
Davis vs. Farmers Co-operative Equity Co., 262 U. S. 312.

II

It is a burden upon interstate commerce to permit suits to be brought in any other state than that in which the plaintiff resided at the time of his injury, or in which the cause of action accrued.

General Orders Director General No. 18 and 18A;
Davis vs. Farmers Co-operative Equity Co., 262 U. S. 312;
Maverick Mills vs. Davis, 294 Fed., l. c. 406.

III

The fact that the defendant corporation is domiciled in the state in which the action is brought does not make a [fol. 48] statute permitting such action any less a burden upon interstate commerce.

Galveston & Harrison Ry. Co. vs. Texas, 210 U. S. 217;
Phila. & Southern Steamship Co. vs. Pa., 122 U. S. 326;
Minnesota vs. Barbour, 136 U. S. 313;
Rollins vs. Shelby Co. Taxing District, 120 U. S. 489.

IV

An unconstitutional law is void or voidable, and a corporation may question its constitutionality if an injured party.

Central Branch Union Ry. Co. vs. Smith, 23 Kans. 745;
Oregon Ry. Co. vs. Oregon Ry. Co., 23 Fed. 232;
14 C. J., p. 246.

V

The Federal Employers' Liability Act does not enlarge the jurisdiction of the state courts.

Mander vs. N. Y., N. H. & H. R. Co., 223 U. S. 1.

Roy W. Rucker, Attorney for Plaintiff in Error.

[fol. 49] [File endorsement omitted.]

Endorsed on cover: File No. 31,488. Missouri Supreme Court. Term No. 765. Dimmitt Hoffman, judge of the Thirtieth Judicial Circuit of Missouri, plaintiff in error, vs. State of Missouri ex rel. W. E. Foraker, administrator of the estate of James Starling Foraker, deceased. Filed October 5th, 1925. File No. 31,488.

No. 225

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1927.

DEMITT HOFFMAN, JUDGE OF THE THIRTEENTH JUDICIAL CIRCUIT OF MISSOURI,
PLAINTIFF IN ERROR,

VS.

STATE OF MISSOURI, AT THE RELATION OF W. E. FORAKER, ADMINISTRATOR OF THE ESTATE OF JAMES STARLING FORAKER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

Roe W. Booker,
Attorney for Plaintiff in Error.

Edward J. Wimer,
Assistant Counsel,
of Counsel.

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No. 765.

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1927.

DIMMITT HOFFMAN, JUDGE OF THE THIRTIETH JUDICIAL CIRCUIT OF MISSOURI,
PLAINTIFF IN ERROR,

VS.

STATE OF MISSOURI, AT THE RELATION OF W. E. FORAKER, ADMINISTRATOR OF THE ESTATE OF JAMES STARLING FORAKER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT.

This cause originated in the Supreme Court of Missouri when, on the 18th of November, 1924, defendant in error filed an original application for a writ of mandamus (Transcript of the Record, page 9) to compel plaintiff in error to set aside an order dismissing the case of W. E. Foraker, administrator of the estate of James Startling Foraker, vs. the Missouri Pacific Railroad Company, and to exercise his jurisdiction

and to proceed with the trial of said case. An alternative writ of mandamus was granted, and plaintiff in error made a return to the writ by filing a demurrer to the petition (Transcript of the Record, page 18).

Defendant in error then filed motion for judgment on the pleadings (Transcript of the Record, page 19).

The Supreme Court of Missouri, after having heard argument of counsel, on the 3rd day of July, 1925, handed down an opinion (Transcript of the Record, page 27) holding that the alternative writ of mandamus should be made peremptory.

Thereafter, on July 13, 1925, plaintiff in error filed petition for rehearing in the Supreme Court of Missouri, which was, on the 18th of July, 1925, overruled (Transcript of the Record, page 30).

Thereafter, plaintiff in error filed his petition for a writ of error to the Supreme Court of the United States (Transcript of the Record, page 2), directed to the Honorable W. W. Graves, Chief Justice of the Supreme Court of the State of Missouri, it being alleged in said petition that there was in drawn question in the final judgment of said cause the validity of a statute of the State of Missouri on the ground of its being repugnant to the Constitution and laws of the United States, and that the decision was in favor of its validity. Accompanying said petition was a bond, together with assignments of error (Transcript of the Record, page 6).

Thereafter, an order was made allowing the writ of error, bond was approved, and it was ordered that the writ of error should operate as a supersedeas (Transcript of the Record, page 7).

Writ of error was issued by F. J. Fromme, Clerk of the District Court of the United States for the Western District of Missouri, Central Division, on the 4th day of August, 1925 (Transcript of the Record, page 8).

Thereafter, on the 16th of October, 1925, plaintiff in error filed in this court points to be relied upon and stipulation as to parts of record to be printed (Transcript of the Record, page 31).

Transcript of the record was filed in this court on the 5th day of October, 1925.

As will appear from the petition for mandamus filed by the defendant in error in the Supreme Court of Missouri, W. E. Foraker, as administrator of the estate of James Starling Foraker, deceased, had on the 4th day of September, 1924, filed a petition in the Circuit Court of Pettis County, Missouri, over which court plaintiff in error presides as trial judge, in which W. E. Foraker, administrator of the estate of James Starling Foraker, deceased, was plaintiff, and Missouri Pacific Railroad Company was defendant. Summons was issued and served in the usual way. It was alleged in the petition that, on the 21st day of November, 1923, James Starling Foraker died testate in the State of Kansas and left surviving him his father, J. B. Foraker, and his mother, Emaline Foraker, both of whom were dependent upon him for support, and both of whom were depending upon him at the time of his death, and that at the time of his death he was a single man without any children or other dependents than his said father and mother.

It was also alleged that at the time of his death James Starling Foraker was a resident of the State of Kansas, and that W. E. Foraker was appointed administrator with the will annexed by the Probate Court of the County of Kansas in which the said Foraker resided at the time of his death, and that by reason of such appointment W. E. Foraker became the trustee for the benefit of said father and mother of the cause of action therein stated.

Said petition then alleged the facts concerning the incorporation of the defendant and its owning and operating

the railroads running through the States of Missouri and Kansas and through Pettis County, Missouri, and through Wichita, Kansas.

The petition alleged that at the time of his death James Starling Foraker was an employee of defendant, and at the time of his death both he and defendant railroad company were engaged in interstate commerce by railroad, and that while so employed in interstate commerce he was killed by and through the negligence of defendant, and that by such facts his father and mother had been damaged; and the petition concluded with the usual prayer for the recovery of damages and costs. (The petition is set out in full beginning page 10 of the Transcript of the Record.)

On November 1, 1924, the same being the first day of the return term, defendant filed a plea in abatement in said cause, praying the court to quash the writ of summons theretofore issued and to dismiss the cause, alleging as ground therefor that Section 1180 of the Revised Statutes of Missouri for 1919, under which the action was brought, was unconstitutional for the reason that it allowed jurisdiction in actions against carriers in interstate commerce based upon causes of action originating in other states where such suits might be lawfully maintained, and thereby imposed upon interstate commerce a serious and unreasonable burden obnoxious to the commerce clause of the Constitution of the United States. It was further alleged in said motion that the defendant was an interstate carrier engaged in interstate commerce, and that the plaintiff's cause of action accrued in the State of Kansas; that defendant had a great many employees working for it in the State of Kansas, and that there were many claims against the defendant for personal injuries and for loss and damage to freight, and that the amounts demanded in such claims were large and that the defendant often deemed it imperative and advisable to leave the deter-

mination of its liability to the courts; that litigation in states and jurisdictions remote from the place where the cause of action arose entailed absence of defendant's employees from their customary occupations, thereby impairing the efficiency in operation of defendant's business as an interstate carrier and causing directly and indirectly heavy expense to the carrier. It was further alleged in said motion that Section 1180, R. S. Mo. 1919, permitted a railroad company engaged in interstate commerce to be sued in any county in the State of Missouri where it usually kept an officer or agent for the transaction of its usual and customary business wholly without regard to whether the cause of action of the plaintiff arose within or without the State of Missouri, or within a foreign state in which the action might lawfully have been brought without imposing an undue and unreasonable burden upon interstate commerce. Motion also alleged that plaintiff, at the time the cause of action arose, was a resident of the State of Kansas, and the administrator might lawfully have maintained his cause of action in said state without imposing any undue or unreasonable burden upon interstate commerce. (Defendant's said motion appears in full beginning on page 12 of the Transcript of the Record.)

Thereupon the said W. E. Foraker, through his attorneys, filed written opposition to the motion to dismiss, alleging that the Missouri Pacific Railroad Company is a corporation organized under the laws of the State of Missouri, and that Section 1180, R. S. Mo. 1919, is a part of its charter and that the provisions thereof are a burden upon defendant which it voluntarily assumed.

It further alleged in said motion that the suit was expressly authorized to be brought in Pettis County under the provisions of the Employers' Liability Act, and that the institution of the suit was not such a burden upon interstate

commerce as to be unreasonable or unconstitutional, and for the further reason that the defendant is actually present in the State of Missouri and in Pettis County.

It was also alleged in said motion that for the court to deny plaintiff the right to sue in Pettis County, Missouri, would amount to a denial to him of the privileges and immunities of the citizens of the several states and would abridge such privileges and immunities, contrary to Section 2, Article IV, and Section 1 of the Fourteenth Amendment of the Constitution of the United States (Transcript of the Record, page 15).

Motion was taken up, and there was introduced in evidence an agreed statement of facts signed by plaintiff and defendant, in which it was admitted that the Missouri Pacific Railroad Company was a Missouri corporation organized in 1917, owning and operating a line of railroad as alleged in the petition; that it was a common carrier by railroad engaged in interstate commerce; that the plaintiff was a citizen and resident of Kansas, and that James Starling Foraker at the time of his death was a resident of the State of Kansas, and that the cause of action arose in the State of Kansas; that defendant had at least eleven employees working for it in Kansas who were competent and material witnesses in the cause; that defendant had many claims against it for personal injuries and for loss and damages for freight, and that the amounts demanded in such claims are often large and that defendant often deems it imperative or advisable to leave the determination of its liability to the courts. It was also admitted that defendant could not safely proceed to trial without the testimony of some of its employees in the State of Kansas, and that to procure their attendance at the trial would cause absence from their work and that their work was connected with interstate commerce

by railroad on the part of defendant, and that to procure their attendance would involve expense upon the part of the defendant. It was further admitted that plaintiff might lawfully maintain his cause of action in the State of Kansas where the cause of action arose (Transcript of the Record, pages 13-14). The above admission was the only evidence offered in support of defendant's motion to dismiss.

The court sustained the motion and held that the Circuit Court of Pettis County, Missouri, had no jurisdiction to try said cause; that Section 1180, R. S. Mo. 1919, as it affected defendant in this suit, unconstitutional under the commerce clause of the Constitution, and that to permit said suit to be maintained would be an undue burden upon interstate commerce. Thereupon the court made an entry of record dismissing the suit (Transcript of the Record, page 14).

Following the dismissal of the suit, defendant in error filed his petition for mandamus in the Supreme Court of Missouri and, as has been heretofore stated, the alternative writ was made peremptory; whereupon plaintiff in error took the necessary steps to present the questions involved to this court for determination:

Section 1180, R. S. Mo. 1919, is as follows:

> "Suits against corporations shall be commenced either in the county where the cause of action accrued, or in case the corporation defendant is a railroad company owning, controlling or operating a railroad running into or through two or more counties in this state, then in either of such counties, or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business."

The sole question presented to this court is whether Section 1180 of the Statutes of Missouri is unconstitutional in that, in allowing jurisdiction in actions against carriers of interstate commerce which are based upon causes of action originating in other states where such suits might be lawfully maintained, said section imposed an unreasonable burden upon interstate commerce and is obnoxious to the commerce clause of the Constitution of the United States.

SPECIFICATIONS OF ERROR.

The Supreme Court of Missouri erred in holding that the provisions of Section 1180, R. S. Mo. 1919, are not in conflict with and in violation of Section 8, Article I, of the Constnitution of the United States.

POINTS AND AUTHORITIES.

I.

A state has no power to pass a law which imposes an undue or unreasonable burden upon interstate commerce and such a law when passed is void.

International Textbook Co. v. *Pig,* 217 U. S. 91.
Western Union Telegraph Co. v. *Kansas,* 216 U. S. 1.
Norfolk & Western Railroad Co. v. *Pa.,* 136 U. S. 114.
McCall v. *California,* 136 U. S. 104.
Piccard v. *Pullman Southern Car Co.,* 117 U. S. 34.
Ashier v. *Texas,* 128 U. S. 129.
Davis v. *Farmers Co-operative Equity Co.,* 262 U. S. 312.

II.

It is a burden upon interstate commerce to permit suits to be brought in any other state than that in which the plaintiff resided at the time of his injury or in which the cause of action accrued.

General Orders Director General No. 18 and 18A.
Davis v. *Farmers Co-operative Equity Co.,* 262 U. S. 312.
Maverick Mills v. *Davis,* 294 Fed. l. c. 406.

III.

The fact that the defendant corporation is domiciled in the state in which the action is brought does not make a statute permitting such action any less a burden upon interstate commerce.

Galveston & Harrison Ry. Co. v. *Texas,* 210 U. S. 217.
Phila. and Southern Steamship Co. v. *Pa.,* 122 U. S. 326.
Minnesota v. *Barbour,* 136 U. S. 313.
Rollins v. *Shelby Co. Taxing District,* 120 U. S. 489.

IV.

An unconstitutional law is void or voidable and a corporation may question its constitutionality if an injured party.

Central Branch Union Pac. Ry. Co. v. *Smith*, 33 Kans. 745.
Oregon Ry. Co. v. *Oregon Ry. Co.*, 23 Frd. 232.
14 C. J. p. 246.

V.

The Federal Employers Liability Act does not enlarge the jurisdiction of the state courts.

Monder v. *N. Y., N. H. & H. Ry. Co.*, 223 U. S. 1.

ARGUMENT.

A state has no power to pass a law which imposes an undue or unreasonable burden upon interstate commerce. By the Federal Constitution, Congress alone is vested with the power to regulate commerce between the states. Therefore when any law is passed by a state which does place an undue or unreasonable burden upon interstate commerce, regardless of the character of the burden so imposed, that law is unconstitutional and void.

As was held in the case of *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 2:

> "The disavowal by a state enacting a regulation of intention to burden or regulate interstate commerce cannot conclude the question of fact of whether a burden is actually imposed thereby; and whatever the purposes of a statute, it is unconstitutional if, when reasonably interpreted, it does, directly or by necessary operation, burden interstate commerce."

In that case the burden imposed upon interstate commerce was that of a tax, but the burden imposed there directly was no greater than the burden imposed upon interstate commerce by Section 1180 R. S. Mo. which permits individuals and corporations engaged in interstate commerce to be sued in the State of Missouri regardless of the state in which the cause of action accrued. Whether the burden imposed by the statute be that of assessing a tax regulating its business or making it amendable to unreasonable service statutes, the burden is there to the same extent and interstate commerce is hampered to that degree. A state cannot in any way attempt to impose burdensome conditions under which interstate commerce can be conducted, whether it be by fixing rates as in *Wabash Railway Co.* v. *Illinois*, 118 U. S. 557;

Covington Bridge Co. v. *Kentucky*, 154 U. S. 204; or by preventing the introduction of certain articles of commerce as in *Bowman* v. *Chicago Railway Co.*, 125 U. S. 465, or by requiring telegraphic messages to be sent in the order received and delivered by messengers within one mile of the office as in *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 47, or by requiring common carriers to give equal passenger accommodations without distinction on account of race or color as in *Hall* v. *DeCuer*, 95 U. S. 485.

It was decided in the case of *International Textbook Co.* v. *Pig*, 217 U. S. 91, that an attempt to impose a license as a condition of the company carrying on interstate commerce which manifested the principal object of the organization was clearly a burden and a restriction upon that commerce whether intended to be such or not, if in fact it did so operate.

It has often been held that an attempt by a state legisture to require operatives of all railroad trains to run the trains in such manner as to have them under control at every public crossing so that they may be stopped before reaching a crossing, imposed an unreasonable burden upon interstate commerce and was therefore void because repugnant to the commerce clause.

So also a requirement of a State Public Service Commission requiring all railroad trains in the states to make stops at certain designated stations, has been held invalid for the same reason.

It is undeniably a burden upon interstate commerce for a state to place it in the power of a non-resident to compel an interstate carrier actively engaged in interstate commerce to take its employees and operatives away from their work and into a foreign state to testify in an action in such foreign state by a non-resident upon a cause of action originat-

ing in the state of the plaintiff's domicile where such action might have lawfully been maintained. Can it be said that if the cause of action accrued in the State of California, it would place no burden upon interstate commerce to require the interstate carrier to defend that cause of action in the State of Illinois? In this day of an epidemic of damage suits, to permit a plaintiff to require the interstate carrier to go entirely across the continent to defend its cause of action, places a far greater burden upon interstate commerce than would have arisen in any of the cases cited above. Such practice, if tolerated, would compel the carrier to compromise law suits against its interest because it could not in discharging the duty which the law imposes upon it for the benefit of the public, fulfill that duty and at the same time have a large number of its employees spread over the four corners of this country serving as witnesses in such jurisdictions.

For this reason the Director General of Railroads after trying out such a practice as is now imposed upon carriers engaged in interstate commerce in this state, realized the burden imposed upon interstate commerce and issued his two general orders known as order No. 18 and 18A, respectively, which prohibited the institution of suits against railroads in the courts of any district other than that in which the plaintiff resided or in which the alleged causes of action arose. The validity of this order was presented to the Supreme Court of Mississippi on the ground that it violated certain constitutional rights and upon appeal to the Supreme Court of the United States, the Supreme Court in the 257 U. S. 111, reversed the Supreme Court of Mississippi and upheld the validity of the order. The court held that the Director General had the authority to prescribe the venue of suits and that the venue so prescribed was valid.

In the case of *Davis* v. *Farmers Co-operative Equity Co.*, 262 U. S. 312, the validity of a statute of Minnesota was

called into question, which permitted service of process upon any soliciting freight or passenger agent of a foreign corporation. The plaintiff brought his action in the courts of Minnesota. He was not a resident of the State of Minnesota and the transaction out of which the cause of action arose had not been entered upon within the State of Minnesota. The defendant appealed specially and moved to dismiss the suit because the statute authorizing services of process was in violation of the commerce clause in that it did not limit the jurisdiction to suits arising out of business transacted within the State of Minnesota. The defendant was a Kansas corporation.

The Supreme Court of Minnesota upheld the validity of the statute and the case was taken to the Supreme Court of the United States upon writ of error. In reversing the case the court had the following to say:

> "That the claims against interstate carriers for personal injuries and for loss and damages of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative or advisable to leave the determination of their liability to the courts; that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers—these are matters of common knowledge. Facts of which we also take judicial notice indicate that the burden upon interstate carriers, imposed specifically by the statute here assailed, is a heavy one; and that the resulting obstruction to commerce must be serious. During Federal control absences of employees incident to such litigation were found, by the Director General, to interfere so much with the physical operation of the railroads, that he issued General Order No. 18 (and 18A) which required suit to be brought in the county or district where the cause of action arose, or where the plaintiff resided at the time it accrued. That order was held reasonable

and valid in *Alabama & V. R. Co.* v. *Journey*, 257 U. S. 111, 66 L. ed. 154, 42 Sup. Ct. Rep. 6. The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war. * * *

"It may be that a statute like that here assailed would be valid although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the state or if the plaintiff was, when it arose, a resident of the state. These questions are not before us, and we express no opinion upon them. But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. The public and the carriers are alike interested in maintaining adequate, uninterrupted transportation service at reasonable cost. This common interest is emphasized by Transportation Act 1920, which authorizes rate increases necessary to insure to carriers efficiently operated a fair return on property devoted to the public use (citing authorities). Avoidance of waste in interstate transportation, as well as maintenance of service, has become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs, and unduly burdens, interstate commerce."

The following quotation from the case of *Atchison, Topeka & Santa Fe R. R. Co.* v. *Weeks*, 254 Fed. 513, is also pertinent to the question under discussion:

"When the law is so doubtful in its terms or its application, there can be no impropriety in considering in its development the public policy involved. As applicable to railroad corporations, the recognition of a right to sue for damages for injuries in any place other than in the state of the injury is of very questionable policy. While the rule may be justified as to an individual on account of the ease with which the right to recover might otherwise be defeated, no such reason exists as to a rail-

road whose residence and business are permanently localized. Manifestly, there are many advantages in trying such a case where the cause of action arises. The law of the cause of action is the law of the place. It may be assumed that the courts of the state can more satisfactorily administer the laws of the state than can the courts of any other state. The expense incident to a trial would usually be materially less at the place of the tort than elsewhere. The imposition upon a state of the expense of maintaining courts to try causes in which the state has no interest would be difficult to justify. The maintenance of the judicial machinery involves no light burden. Many of the states, including Texas, have been unable to provide adequate machinery. No good reason could probably be made to appear why her overworked courts should be compelled to carry any part of the burden of other states."

It is obvious from the decisions above quoted that the Federal courts realize that an undue burden is imposed upon interstate commerce by the toleration of such practices. To take a large number of this carrier's operatives away from their work in Wichita, Kansas, and bring them into a foreign state entails just as much absence of the employees from their customary occupation and impairs as greatly the efficiency of the interstate carrier as though the defendant was a non-resident corporation. The fact that a carrier is a resident of the state in which the suit is brought has no tendency to diminish the burden imposed upon interstate commerce. Whether it be a resident or non-resident of the state in which the cause of action is brought, it must repair to the scene of action with all the employees necessary to the defense of its action and as a result must withdraw them from the interstate service in which it is engaged. If there was only one such suit brought in a jurisdiction far from where the cause of action accrued, this might not entail so great a burden, but considering the actual situation there cannot help but be an undue burden upon interstate commerce. The average

interstate carrier owns and operates several thousands of miles of railroad extending into several states. Such carriers have found it necessary to submit the question of their liability to the courts and there are often dozens of suits being prosecuted against the interstate carrier at various points on its lines at the same time. If it is possible for the plaintiff to cause the interstate carrier to defend in a jurisdiction far remote from the state where the cause of action accrued or the plaintiff resided, it does not require an imaginative mind to picture the chaos which would result, the disruption of the morale of the service and its consequent burden upon interstate commerce. Where there are many suits being litigated at the same time it would require every interstate carrier to have no small part of her employees upon the trains jumping back and forth from state to state in attendance upon the courts.

The burden imposed upon interstate commerce by the allowance of such practice cannot possibly be lighted by the fact that the defendant interstate carrier is a resident of the state in which the suit is brought. If the cause of action accrued in California, the fact that the defendant interstate carrier could be found doing business in New Hampshire does not tend to decrease the burden imposed upon interstate commerce, for whether it be a resident of the State of New Hampshire or of Vermont, the burden imposed upon interstate commerce is the same. The cases cited in support of this proposition say the ultimate test is whether the state has placed an undue burden upon interstate commerce and, if that appears, then the statute so passed is void, whether the carrier engaged in interstate commerce be a resident or non-resident of the state. It seems to be so plain as not to need authorities to support it. Where a statute is unconstitutional because it violates the interstate commerce clause, the question of the

residence or non-residence of an interstate carrier is not to be considered. So always, in such cases, the question is not whether or not the carrier is a resident or non-resident of the state, but is whether the carrier, resident or non-resident, is engaged in interstate commerce and whether the statute sought to be declared unconstitutional imposes an undue burden upon such commerce.

The relator seems to contend that the unconstitutionality of Section 1180 R. S. Mo. 1919 cannot be raised by the carrier defendant. That an act which is unconstitutional is void or voidable is so generally accepted that it is needless to cite authorities in support of it. The doctrine of estoppel which he seeks to invoke against corporations denying them the right to question the constitutionality of the acts which created them is not applicable in this case. The act now being questioned is a distinct and separate statute from those incorporating and creating this railroad corporation. We are not considering a case where a corporation organized under an unconstitutional act becomes a *de facto* corporation. The interstate carrier in this case is asserting the right which it and every other carrier and individual which is injured by the enforcement of an unconstitutional act, has the right to raise. If it is unconstitutional today it was unconstitutional the day it was promulgated by the Chief Executive of this state and if it was unconstitutional at that time it has never been a law and was not a valid law at the time the interstate carrier was incorporated in this state. That which is invalid cannot be made constitutional by an estoppel. As was said in *Central Branch Union Railroad Company* v. *Smith*, 23 Kansas 745, by Justice Brewer:

> "A corporation may sometimes be estopped from showing its own wrongful acts done under a valid law; *but there is no such thing as a void enactment being made valid by estoppel.*"

The plaintiff insists that the Federal Employers Liability Act under which the original cause of action was instituted actually permits the plaintiff to sue the carrier engaged in interstate commerce at a place foreign to that in which the cause of action accrued and where the plaintiff resided. The Federal Employers Liability Act provides that "The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states."

That act recognized the jurisdiction of the state courts and did not seek to enlarge that jurisdiction.

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The act did not provide that the jurisdiction of the courts of the several states should be concurrent with that of the United States. If it had so provided, the relator might possibly contend that when the Federal Employers Liability Act stated the venue in which these suits should be brought, that that venue sould also apply to actions brought in state courts. Jurisdiction and venue must be distinguished in properly interpreting this statute. The act in speaking of the Federal courts says the venue for trying of these cases shall be "In the district of the residence of the defendant or in which the cause of action arose or in which the defendant shall be doing business at the time of the commencement of such action."

That Congress in saying that suits brought in the Federal courts may be brought "in the district of the residence of the defendant or in which the cause of action arose or in which the defendant shall be doing business at the time of the commencement of such action," was speaking of the venue of cases when tried by the Federal courts, is readily seen from an examination of the case of *Ellis* v. *Atlanta Railway Company*, 270 Fed. 279. It will be further seen from that case that the Director General in making his Orders 18 and 18A was limiting the venue where suits may be brought and

not the jurisdiction of the courts. That there is a distinction between venue and jurisdiction is supported by the case of *Fribourg* v. *Pullman Co.*, 176 Fed. 981.

Under this Act Congress has not provided that suits in the state courts may be brought in the state of the residence of the defendant or in which the cause of action arose or in which the defendant shall be doing business at the time of the commencement of said action. Congress has consented that interstate commerce may be burdened by having suits brought in the Federal courts in the three different venues mentioned in the statute. But it has not consented that interstate commerce may be burdened by having actions brought in the same venues in the state courts. In fact it has impliedly prohibited the burdening of interstate commerce by bringing actions in the state courts by the fact that it mentioned in what venue the actions should be brought if tried in the Federal courts but said nothing about the state courts. When Congress has spoken and has placed a burden upon interstate commerce, whether that burden is reasonable or unreasonable, is immaterial, but where Congress itself has not placed an undue burden upon interstate commerce such an undue burden cannot be placed on such commerce by any authority. It is not within the power of the legislature of the State of Missouri to do that which Congress has properly omitted to do and if a state by its enactment seeks to place such an undue burden upon interstate commerce, the question of whether it has done so or not is a judicial question to be determined by the courts.

Congress could not in more apt words withheld its consent for any state to impose an undue burden on interstate commerce under the guise of the Federal Employers Liability Act than it has already done. It has said that interstate commerce may be burdened by suits in the Federal courts in the

three places so designated. As to causes of action arising under the Federal Employers Liability Act and tried in the state courts it has left the question of venue to be determined by the State Legislature, but it has not announced that legislatures may in prescribing the venue place an undue burden upon interstate commerce.

Whether the state legislatures have so intended or not is immaterial. If the service statutes designating the venue in which actions may be brought in the state courts directly or indirectly throw an undue burden upon interstate commerce then those statutes are unconstitutional as in violation of the interstate commerce clause of the Federal constitution. Such a law as that is now in question. Congress not having consented that interstate commerce could be burdened by venue laws or any other laws passed by state legislatures, the only question to be determined in this cause is whether Section 1180 R. S. Mo. 1919 has placed upon interstate commerce an undue and unreasonable burden.

Respectfully submitted,

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E. J. WHITE,
JAS. F. GREEN,
of Counsel.

MAR 11 1927
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

1927 TERM

TERM NO. 76 [redacted] 225
File No. 31488

DIMMITT HOFFMAN, JUDGE OF THE 30th JUDICIAL CIRCUIT OF MISSOURI
PLAINTIFF IN ERROR,

vs.

STATE OF MISSOURI AT THE RELATION OF W. E. FORAKER, ADMINISTRATOR OF THE ESTATE OF JAMES STARLING FORAKER, DECEASED.
DEFENDANT IN ERROR.

IN ERROR TO THE SUPERME COURT OF THE STATE OF MISSOURI

BRIEF OF DEFENDANT IN ERROR

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File No. 31488

IN THE

Supreme Court of the United States

1927 TERM

TERM NO. 765

DIMMITT HOFFMAN, JUDGE OF THE 30th JUDICIAL CIRCUIT OF MISSOURI

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vs.

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DEFENDANT IN ERROR.

IN ERROR TO THE SUPERME COURT OF THE STATE OF MISSOURI

ABSTRACT OF THE CASE.

This case is here by writ of error to the Supreme Court of Missouri for the review of a final judgment of that court in the form of a peremptory writ of mandamus commanding the Honor-

able Dimmitt Hoffman as judge of the thirtieth judicial Circuit of Missouri, or in other words of the Circuit Court of Pettis County, Missouri, to set aside an order of that court dismissing a certain action at law upon the ground of want of jurisdiction, and to proceed with the cause in exercise of the jurisdiction, which the said circuit court possessed as said Missouri Supreme Court held, although said circuit court had acted upon the theory that it had no such jurisdiction.

The case is reported at 309 Mo., 625.

It is not questioned that the Missouri Supreme Court has original jurisdiction in mandamus, nor that it has superintending control over all the other courts of that state by the writs of mandamus, prohibition and certiorari.

The facts of the record necessary to be considered are as follows, all of which appear from the undenied allegations of the petition for mandamus filed in the Missouri Supreme Court (R. 9.)

W. E. Foraker, as administrator of the estate of James Starling Foraker, deceased, by appointment of the Probate Court of Swedgwick County, Kansas, brought suit in the Circuit Court of Pettis County, Missouri against the Missouri corporation operating a line of railroad running through said Pettis County, Missouri, and extending into the state of Kansas.

The action is under the Federal Employers Liability Act, the petition alleging that said James Starling Foraker, deceased, while working in interstate commerce as an employee of said Missouri Pacific Railway Company, and within the scope of such employment, was killed as a direct result of negligence upon the part of said railroad company.

Service was had upon said defendant by delivery of summons and certified copy of the petition upon the defendant's station agent at Sedalia in said county in conformity with Section 1180 of the Revised Statutes of Missouri of 1919, which section is in full as follows:

"Suits against corporations shall be commenced either in the

counties where the cause of action accrued, or in case the corporation defendant is a railroad company, owning, controlling or operating a railroad running through or into two or more counties, in this state, then in either of such counties, or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business."

The defendant railroad company filed a motion to dismiss the action, alleging as ground therefor that said section 1180 of the Revised Statutes of Missouri of 1919, under which the venue was laid, was unconstitutional for the reason that it allowed jurisdiction in actions against carriers of interstate commerce which are based upon causes of action originating in other states where such suit might be lawfully maintained, and thereby imposes upon interstate commerce a serious and unreasonable burden obnoxious to that provision of section 8 of article one of the Constitution of the United States giving to the congress the power to regulate commerce among the several states.

In said motion to dismiss it was alleged that defendant was a carrier engaged in interstate commerce; that the cause of action sued upon accrued in Kansas; that defendant had a great many employes in Kansas; that there were many claims against defendant for personal injuries and for loss and damage to freight in large amounts, and that the defendant frequently deems it advisable to leave the determination of its liability to the courts; but that litigation in jurisdictions remote from the place where the cause of action accrues, necessitates the absence of the defendant's employees from their customary occupations, thereby impairing the efficiency of defendant's operation of its business as an interstate carrier at defendant's expense; that said section 1180 permits a railroad company, although engaged in interstate commerce, to be sued in any county in Missouri where such corporation has or usually keeps an officer or agent for the transaction of its usual and customary business even though the cause of action may have arisen in a foreign state in which action might

lawfully be brought without imposing the burden aforesaid; and that at the time the cause of action arose the plaintiff was a resident of Kansas where he might lawfully maintain the action against the defendant.

The motion was heard upon an agreed statement of facts from which it appeared that Missouri Pacific Railroad Company was a railroad corporation organized in 1917 under the laws of Missouri and owning and operating a line of railroad running through Pettis County and other counties of Missouri and into and through the state of Kansas and other states; that it was a common carrier engaged in interstate commerce; that the plaintiff was a citizen and a resident of Kansas; that James Starling Foraker, deceased, was at the time of his death a citizen and resident of Kansas; and that the cause of action accrued in Kansas; that defendant had at least eleven employees working for it in Kansas, who were competent and material witnesses in this cause; that there were many claims against the defendant for injuries and for loss and damages to freight in large amounts; that the defendant often deemed it advisable to leave the determination of its liability to the courts; that defendant could not safely proceed to trial in the cause without the testimony of some of its employees in Kansas, and that to procure their attendance at the trial in Pettis County, Missouri, would cause absence from their work; that the work was connected with defendant's interstate commerce by railroad, and that to procure their attendance would involve expense upon the part of the defendant; that the plaintiff might lawfully maintain his cause of action, if any, against the defendant in Kansas where the cause of action arose.

The trial court sustained said motion to dismiss, which is to say that it found said section 1180 of the Revised Statutes of Missouri, hereinabove set out, to be unconstitutional as an undue burden upon interstate commerce as in said motion alleged. Upon plaintiff's application the Missouri Supreme Court allowed an alternative writ of mandamus to the judge of said trial court

to compel said court to proceed to try the cause in the exercise of its jurisdiction (R. 17) and upon final hearing the alternative writ of mandamus was made peremptory, (R. 20) that is to say, the Missouri Supreme Court held that said section 1180 of the Missouri statutes is constitutional and that said trial court erred in holding the same to be unconstitutional.

The case is here upon writ of error for the review of the said action of the Missouri Supreme Court holding that said section 1180 of the Revised Statutes of Missouri is constitutional and not an undue burden upon interstate commerce.

BRIEF OF THE ARGUMENT

A corporation or natural person engaged in interstate commerce is subject to be sued in transitory actions and is subject to the same character of process in the same courts, under the same circumstances and at the same places as though such person were not engaged in intertate commerce.

Davis vs. Farmers Cooperative Equity Co., 262 U. S. 312.

International Harvester Co., vs. Kentucky 234 U. S. 312.

State of Missouri ex rel St. Louis, Brownsville and Mexico Railway Co., vs. Wilson A. Taylor, judge 266 U. S. 300.

II

The plaintiff in error seems to think it finds aid and comfort in the case of Davis vs. Farmers Co-operative Equity Company, supra, in which this court held a certain Minnesota statute void as an undue burden upon interstate commerce. That statute was an attempt by legislative fiat to bring within the jurisdiction of the state foreign corporations not in fact within the state. The statute permitted a suit to be brought in Minnesota against a railroad corporation operating no line of railroad and transacting none of its customary business within that state, by a plaintiff not a resident of that state upon a cause of action not arising within that state. It has always been held that the presence of an agent who merely solicits business and nothing more, does not make a foreign corporation present in the state so as to subject it to suit and the reach of process of the local courts.

Mayerick Mills vs. Davis 294 Fed. 404.
O'Brien vs. Southern Bell Telephone Co., 292 Fed. 379.
Knapp vs. Bullock Tractor Co., 242 Fed., 543.
Farmers and Merchants Bank vs. Federal Reserve Bank 286 Fed., 566.
Denver etc. Co., vs. Roller, 100 Fed. 738.
State vs. Graham, 239 Mo., 135.
15 C. J. 791; 14a C. J. 1383.
Peoples Tobacco Co., vs. American Tobacco Co., 246 U. S. 79.
Stephen vs. Union Pacific 275 Fed. 709.

III

If there be any logical connection, either between the parties or the cause of action and the place where suit is brought, then interstate commerce will not serve to protect a corporation from process issued in a transitory action.

State of Missouri ex rel St. Louis, Brownsville, and Mexico Railway Co., vs. Wilson A. Taylor, judge, 266 U. S. 300.

It is not contended that a suit in Pettis county imposes any greater burden upon interstate commerce than the same would be if instituted in the county of Missouri where the defendant's main office is located. Considered as a burden upon interstate commerce, this is merely a suit against a resident defendant at a place where the defendant was found.

To be such an undue burden upon interstate commerce as to offend the federal constitution, the burden must be arbitrary, oppressively unreasonable and contrary to the fundamental and usual conceptions of justice. Furthermore, a statute is not unconstitutional because of a hardship in an individual case, but

only when it appears that the general plan of the state is both oppressive and contrary to the principles of the common law.

Ownbey vs. Morgan 256 U. S. 94.

The only complaint in this case is against the burden of being sued in the state of the residence of the defendant and in the county where the defendant is found, and not at the place where the cause of action accrued and where the witnesses can more conveniently be produced. The statute permitting such a suit is in comformity with the principles recognized in transitory actions at common law, in the federal courts, and by every state in the union.

At common law "in a transitory action the plaintiff may lay the venue in any county he pleases; that is, he may bring suit wherever he may find the defendant, and lay his cause of action to have arisen there, even though the cause of action arose in a foreign jurisdiction."

Bouvier's Law Dictionary, sixth edition, volume 2, page 622.

In at least forty-four of the states of the union transitory actions may be brought at the residence of the defendant.

40 Cyc., 94.

In the Federal courts the general statute concerning transitory causes of action provides that a civil suit shall be brought in the district whereof defendant is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant.

Judicial Code, Section 51.

This particular suit was brought under the Federal Employers Liability Act. The venue section of that act provides as follows:

"Under this acts an action may be brought in a circuit court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this action shall be concurrent with that of the courts of the several states."

An act to amend an act entitled: "An act relating to the Liability of Common Carriers by Railroad to its Employees in Certain cases," approved April 5, 1910.

The Missouri statute attacked as unconstitutional only permits suit to be brought in the state court at the same place where it might be brought in the federal court by virtue of an express act of Congress. Conceding that Congress has power to regulate interstate commerce, yet Congress by permitting a suit under the Employers Liability Act to be brought at any place where the defendant does business, has sanctioned similar proceedings in the state courts rather than expressed by implication a direction that such suits may not be brought.

ARGUMENT

The contention of plaintiff in error in the instant suit was inspired by the decision of the Supreme Court of the United States in the case of Davis vs. Farmers Cooperative Equity Co., 262 U. S. 312. In that case the Supreme Court declared a state venue statute unconstitutional as an undue burden upon interstate commerce.. It follows that the Supreme Court has power to declare section 1180 of the Revised Statutes of Missouri of 1919 unconstitutional, if said section constitutes an undue burden upon interstate commerce. But there is a vast difference between a burden and an undue burden. A corporation engaged in interstate commerce must be subject to the process of the courts. It is not entitled to special immunities. It may be sued in any court where natural principles of justice permit any person, natural or artifical, to be sued. Even in the case relied upon by plaintiff in error, the court expressly held that a corporation was not entitled to any special immunities from judicial process by reason of its being engaged in interstate commerce. It follows that for a venue statute to be such an unreasonable burden upon interstate commerce as to render the statute void, the burden must be arbitrary, oppressive and contrary to natural justice. In other words it must be so arbitrary as to deny inherent rights, must be contrary to the fundamental and underlying principles of free government. Since it has been held that a defendant's interstate business entitles it to no special exemption from judicial process, it would seem that a venue statute would not be void under the commerce clause of the constitution, unless also void as a denial of due process of law; because an arbitrary and unreasonable statute ought not to be borne by any man, whether he be engaged in interstate commerce or not. It has long been recognized that the due process clause of the constitution is not a mere regu-

lation of practice requiring summons and a day in court, but that it also protects life, liberty and property by its operation upon substantive law. A statute which changes the substantive law, in such manner as arbitrarily and unreasonably to deprive a citizen of his inherent rights and his natural privileges, contrary to the course of the common law, and contrary to the fundamental principles of free government, is a violation of the due process clause of the constitution. Yet the Supreme Court of the United States has held that even though a statute should impose a great burden upon a defendant, yet such a statute is not unconstitutional if the burden is such as was permitted at common law. Neither can such a statute be declared unconstitutional upon a showing that a hardship exists under the statute in a particular case. If the plan of the statute be not arbitrary and unreasonable, then the statute must stand. These principles are clearly enunciated in the case of Ownbey vs. Morgan 256 U. S. 94. In that case the state statue provided that when a non-resident was sued by attachment he must give bond to the value of any property attached before he would be permitted to make his defense. A non-resident of the state was sued by attachment and he filed a motion praying that he be permitted to file answer without giving bond, alleging that by reason of the attachment, all of his property was put in such condition that he had been rendered incapable of giving bond. The Supreme Court of the United States sustained the validity of the statute, holding that the statute was substantially a re-enactment of the custom of London concerning attachment suits. Therefore, being a practise recognized by the common law before the adoption of the constitution, it could not be said that the statute denies due process of law. The court further held that the particular hardship visited upon the defendant because of his peculiar circumstances did not justify the court in holding the statute unconstitutional.

In the instant case the hardship involved in the plan of the

Missouri statute is the inconvenience and expense incident to a trial at a place other than that where the cause of action arose. But the statute merely permitted a Missouri corporation to be sued in Missouri at a place where it is found. Such was the rule at common law as to transitory actions. It is the rule in at least forty-four if not in all of the states of the union. It is the general rule in the federal courts and the rule expressly authorized by the Employers Liability Act, under which the action was brought.

If the commerce clause of the Constitution has really branched out into such far reaching ramifications as are contended for by the plaintiff in error, then all state venue statutes are void as to all corporations and natural persons engaged in interstate commerce, because they cannot be followed except in those cases where as a matter of natural justice they express the rule that would be followed anyhow. To uphold such contention would be tantamount to a declaration that when natural or artifical persons engaged in interstate commerce are sued in the state courts, the question of venue is not a matter to be determined by the legislature, but rather by judicial discretion according to the particular facts in each case. It would be necessary in each case to have a preliminary equitable inquiry upon disputed issues of expense and convenience in order to lay the venue. We submit that such is not the meaning of the constitutional power of the congress to regulate commerce between the states. Such a construction would increase rather than lighten the burdens of those engaged in interstate commerce. It would require two law suits to be tried instead of one. We take it that the protecting arm of the commerce clause would not reach so far as to prevent the plaintiff from being heard upon the question of venue. This being true, there would be a constant stream of complaints, first to the courts of last resort in the states, and then to the Supreme Court of the United States, not for the purpose of constructing

statutes as to their validity in their general application, but upon disputed issues of fact touching matters of convenience and expense in each particular case.

Respectfully submitted,
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Attorneys for defendant in error.

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SUPREME COURT OF THE UNITED STATES.

No. 225.—October Term, 1926.

Dimmitt Hoffman, Judge, etc., Plaintiff in Error, *vs.* State of Missouri *ex rel.* Foraker.	In Error to the Supreme Court of Missouri.

[April 11, 1927.]

Mr. Justice Brandeis delivered the opinion of the Court.

This is a writ of error to the Supreme Court of Missouri, which had granted, in an original proceeding, a peremptory writ of mandamus. 309 Mo. 625. Its judgment directed the judge of an inferior court to set aside a judgment dismissing an action and ordered him to entertain jurisdiction. That action had been brought under the Federal Employers Liability Act by a citizen and resident of Kansas for the death of an employee of the Missouri Pacific Railroad. The accident occurred on its line in Kansas, and the deceased was a citizen of Kansas at the time of his death. The railroad is a Missouri corporation. The action was brought in a county traversed by the railroad, in which it had an office and an agent for the transaction of business. Under a statute of the State it was liable to suit there. 1919 Mo. Rev. Stat., § 1180.

The railroad contends that, as it could have been sued in Kansas where the accident occurred and the plaintiff resided, the statute, as applied, was void, under the doctrine of *Davis* v. *Farmers' Cooperative Equity Co.*, 262 U. S. 312, and *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wells*, 265 U. S. 101, because a suit in Missouri would burden interstate commerce. In support of its contention, it was urged that the claims against the carrier for personal injuries are numerous; that the amounts demanded are large; that in many cases the carrier deems it advisable to leave the determination of liability to the courts; that in the action in question there were at least eleven employees working for it in Kansas who were

material witnesses, without whose attendance it could not safely proceed to trial; that to procure their attendance at the trial in Missouri would cause absence from their work in interstate commerce; and that this would subject the carrier to expense.

These allegations remind of *Davis* v. *Farmers' Cooperative Equity Co.* But other facts on which the decision of that case was rested are absent in the case at bar. Here, the railroad is not a foreign corporation; it is sued in the State of its incorporation. It is sued in a State in which it owns and operates a railroad. It is sued in a county in which it has an agent and a usual place of business. It is sued in a State in which it carries on doubtless intrastate as well as interstate business. Even a foreign corporation is not immune from the ordinary processes of the courts of a State where its business is entirely interstate in character. *International Harvester Co.* v. *Kentucky,* 234 U. S. 579. It must submit, if there is jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened. Compare *Kane* v. *New Jersey,* 242 U. S. 160, 167; *St. Louis, Brownsville & Mexico Ry.* v. *Taylor,* 266 U. S. 200.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.